

2014 APAAC Annual Prosecutor Conference

July 30-August 1, 2014
Westin La Paloma Resort
Tucson, Arizona



UNRAVELING THE SPIDERMAN WEB OF RULE 404 (b)

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1. *State v. Andriano*, 215 Ariz. 497 (2007): Andriano beat and stabbed her husband to death. On appeal of her first degree murder conviction and death sentence, she claimed the trial court erred in admitting evidence of her extramarital affairs and attempts to obtain life insurance on her husband's life as intrinsic.

HELD: Neither category of evidence (affairs or attempts to procure insurance) was intrinsic. However, the trial court did not abuse its discretion in admitting the evidence because both categories of evidence were admissible under Rule 404(b).

The attempts to obtain insurance showed her plan, knowledge, and intent, and that she premeditated the murder. This significant probative value "is not substantially outweighed by the danger of unfair prejudice to Andriano." [NOTE- it appears the appellate court conducted this Rule 403 balancing *de novo*].

Andriano's affairs showed her motive for killing her husband (to be free to pursue other relationships, a desire she had discussed with her hairdresser). It was separately admissible to rebut the defense theory that Andriano was a DV victim who lived in fear of her abusive husband and therefore bludgeoned to death in self-defense.

2. *State v. Apelt*, 176 Ariz. 349 (1993): Apelt and his brother were German citizens who traveled to Phoenix and tried to con various women, culminating in a marriage between Apelt and the victim and two life insurance policies totaling \$400K on the victim's life. Relying on *Romero*, 130 Ariz. 142 (1981), the Supreme Court summarily rejected Apelt's claim that evidence of the brothers' shopping sprees and relationships with women should have been precluded under Rule 404(b).

3. *State v. Beasley*, 205 Ariz. 334 (App. 2003): Defendant was mistakenly released from jail and, to avoid re-arrest, got in a shootout with officers. He argued the trial court erred in refusing to suppress statements to arresting officers that he fled because he had been mistakenly released and did not want to return to jail.

HELD: Relying on *Van Adams* and *Martinez*, the court found no abuse of discretion, because the statements explained the motive for D's actions.

The appellate court rejected D's argument that the trial court failed to make explicit findings under Rule 403, finding that explicit findings are not necessary when it is clear the necessary factors were argued, considered, and balanced by the trial court as part of its ruling. The transcript showed the parties argued the probative value and any unfair prejudice. The record also shows the trial court clearly balanced these competing factors. [NOTE- query how the record showed the trial court clearly balanced the factors in the absence of explicit findings. Unfortunately the opinion

does not offer any specifics].

4. *State v. Bojorquez*, 151 Ariz. 611 (App. 1986): Defendant and accomplices robbed a "john" who thought he was entering into a transaction with one of the accomplices for an act of prostitution. The robbery consisted of cash, not drugs. At trial, the court allowed the State to introduce evidence that D was found to possess heroin when booked into jail.

HELD: The appellate court overturned D's convictions for armed robbery, holding that the possession of drugs did not "complete the story" of the robbery, but was a completely separate crime. The appellate court could not say the error was harmless BRD.

"Courts have exhibited great concern when the evidence of other bad acts involving narcotics is sought to be admitted in a case charging the theft of money or items other than narcotics."

The court noted no link was demonstrated between the stolen money and the heroin (for example, that D had less \$ than was stolen on him because he used the money to buy heroin, or that D did not have the heroin before the robbery).

5. *State v. Butler*, 230 Ariz. 465 (App. 2012): Butler was convicted of conspiring to transport MJ for sale. He argued on appeal the trial court erred in admitting evidence of a Nike shoe box containing a large amount of currency.

HELD: The trial court reasonably could conclude the receipt directly proved the alleged conspiracy or directly facilitated the conspiracy, and thereby satisfied the *Ferrero* standard for intrinsic evidence.

The appellate court rejected the argument that the trial court did not properly conduct Rule 403 balancing. The trial court directly stated that the evidence was highly probative. The appellate court found "[i]n the context of the exchange [regarding probative value], the [trial] court implicitly concluded the probative value outweighed any improper prejudicial impact."

6. *State v. Coghill*, 216 Ariz. 578 (App. 2008): Coghill was convicted of sexual exploitation of a minor for possessing child pornography. On appeal, he claimed the trial court erroneously admitted evidence of adult pornography.

HELD: The State properly could admit evidence of Coghill's ability and opportunity to download and copy other material from the internet onto CD's (as he had done with the child pornography, which he claimed his roommate and accuser downloaded and copied). But this did not require any reference to the nature and

content of the CD's.

"In the context of Rule 404(b), Arizona courts have emphasized the importance of the trial court's role in removing unnecessary inflammatory detail from other-act evidence before admitting it."

The trial court abused its discretion to the extent it ruled the evidence of **adult** pornography was admissible because it tended to prove Coghill would download **child** pornography.

D was entitled to a new trial, because the appellate court could not find the error harmless. The case boiled down to a credibility contest between Coghill and his roommate; the case was "close, defensible, and dependent in part on the jury's assessment of Coghill's credibility."

7. *State v. Coker*, 169 Ariz. 2 (App. 1991): Larry Coker and his twin brother, Les, sold fork lifts they did not own. His defense was that he did not know his brother did not have title. In rebuttal, the State was permitted to introduce evidence that on two separate occasions 6 months and 2.5 years before the sale, Coker identified himself to police as his twin brother. Coker did not testify at trial.

HELD: The evidence was inadmissible under Rule 404, because it merely invites the jury to infer that when Coker gets in trouble, he blames his brother. It is thus character evidence. Because defendant did not testify, it is not relevant impeachment. Lying about his identity in past incidents in which his brother was not involved does not prove knowledge of the lack of title in this case.

"If those prior acts show knowledge they can only do so in an improper way—that the defendant was twice involved with the police and twice lied and thus is crooked and probably guilty of this crime." Reversed.

8. *State v. Connor*, 215 Ariz. 553 (App. 2007): Connor stabbed the victim 84 times and killed him in his own apartment. Connor's DNA was found on the victim and at the scene. Connor initially denied being at the scene, but eventually admitted to the stabbing, claiming self-defense. At trial, the State was permitted to introduce evidence that the victim's friends and family suspected Connor of a prior burglary of the victim's apartment and that the victim's mother suspected Connor of defrauding the victim in a check-cashing scheme. Trial judge McClennen permitted both types of evidence so the State could rebut Connor's assertion that he and the victim were friends and he was welcome in the victim's apartment.

Evidence of the burglary was not true "other-act evidence" under Rule 404, because the purpose was not to prove Connor burglarized the victim's apartment, but that the

victim had been warned to stay away from Connor and therefore he was not welcome at the victim's apartment. To avoid prejudice, the trial court instructed the jury there was no evidence Connor in fact burglarized the apartment. There was no abuse of discretion in admitting the evidence as relevant to the victim's state of mind under Rules 401 and 402, not unduly prejudicial under Rule 403, and not excluded by Rule 404(b).

Evidence of the check-cashing scheme was properly admitted. Connor claimed he was welcome at the apartment, and the victim had been paranoid and accusatory toward him about stealing money. The State introduced testimony that Connor had asked the victim to cash checks for him, and that the victim's mother had warned the victim to stay away from people who asked him to cash checks and only let close friends in the apartment. This testimony was proper rebuttal of Connor's testimony because the jury could conclude that Connor was not welcome at the apartment and the victim had a reason for accusing him of stealing money.

9. *State v. Dickens*, 187 Ariz. 1 (1996): Dickens met 14 year-old Travis Amaral while working as a counselor at a center for violent juveniles in CA. Dickens moved to Yuma and Amaral ran away from home to join him there. They decided to commit an armed robbery; they went to a highway rest area, and Amaral robbed a couple and shot them both in the head, killing them. Dickens was convicted of 2 counts of felony murder and sentenced to death. He claimed he had been improperly prevented from introducing evidence of Amaral's other acts, and that the State had been improperly permitted to introduce evidence of his own other acts.

The trial court precluded Dickens from introducing evidence of other, specific acts of Amaral. The Supreme Court noted that other acts of a witness or only admissible if: (1) they are probative of truthfulness and may be proven without extrinsic evidence (Rule 608), or (2) if relevant for some other proper purpose under Rule 404(b). Dickens had failed to describe any such acts with specificity, beyond references in pretrial briefing to acts "including thefts and robbery." Based on such a sparse record, the Supreme Court could not conclude the trial judge abused his discretion in precluding the acts. The judge specifically found any probative value was substantially outweighed by the likelihood of confusing the jurors as well as prolonging the trial.

The trial court permitted the State to admit testimony that Dickens stole the murder weapon from a co-worker at a security firm in California. On appeal, Dickens contended both that the evidence was unduly prejudicial and there was insufficient evidence of the prior theft. The Supreme Court held Dickens' acquisition of the murder weapon was probative of several proper Rule 404(b) purposes [NOTE- the opinion does not say which, but presumably opportunity, intent, preparation, plan and knowledge all might apply here]. It was particularly relevant because Dickens

claimed Amaral got the gun without his knowledge. The Court also held "there was substantial evidence of the theft" so the trial judge did not abuse his discretion in admitting the evidence.

10. *State v. Featherman*, 133 Ariz. 340 (App. 1982): Featherman's estranged wife went missing in 1976. Her body was found in 1977. At his murder trial, the trial court admitted evidence that Featherman previously beat his wife, including one incident in which he supposedly hit her in the head with a baseball bat. On appeal, Featherman claimed both that the baseball bat incident did not fall within any Rule 404 exception, the evidence of the incident was insufficient, and the prejudicial effect too great.

HELD: The baseball bat incident, which occurred 2 months before the murder, was relevant to Featherman's intent. In determining the prior act was not too remote, the court relied on *State v. Denny*, 27 Ariz.App. 354 (1976), which involved a prior act five months prior to the charged act. "Intent is frequently shown by evidence of other criminal acts of the same character." The court also found sufficient evidence of the baseball bat incident.

11. *State v. Ferrero*, 229 Ariz. 239 (2012): [This is a Rule 404(c) case. However, it addressed the definition of intrinsic evidence, so it is included here.] The Supreme Court noted that Rule 404 only governs "other acts" not acts that "are so closely related to the charged act that they cannot fairly be considered 'other' acts, but rather are part of the charged act itself."

HELD: Evidence is intrinsic if it (1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act.

12. *State v. Fish*, 222 Ariz. 109 (App. 2009): Fish was hiking near Strawberry and came upon the victim, who was exercising some dogs from the Payson Humane Society. The dogs ran at Fish who first fired a warning shot at the ground and then shot the victim 3 times in the chest killing him. Fish claimed self-defense and said the victim ran at him with eyes crossed, looking crazy, and "doing this weird kind of punching thing." The trial court precluded evidence of prior specific acts of violence of the victim. On appeal, the court reversed and remanded on other grounds, but noted the trial court may have erred in precluding the evidence.

Defendant sought to introduce evidence at trial that the victim got a wild look and thrashed the air or pushed people when confronted about his dog. The State claimed such acts were not admissible given Fish's lack of knowledge of them.

HELD: After a lengthy exegesis, the appellate court determined the trial court properly excluded the specific act evidence for the purpose of showing the victim

was the initial aggressor, under Rule 404(a)(2), because Fish did not know of them. The evidence was also properly precluded under Rule 404(b) for the purpose of showing the reasonableness of Fish's belief he was in imminent danger.

BUT... The trial court erred in precluding the other act evidence for the proper Rule 404(b) purpose of corroborating Fish's version of events. The court noted prior acts of a victim unknown to the defendant would not be admissible in every self-defense case. Here, such evidence may have been admissible because of the high degree of relevance to the self-defense claim.

The court went on to reject the trial court's Rule 403 balancing, despite the broad discretion which resides with the trial court.

13. *State v. Hardy*, 230 Ariz. 281 (2012): Hardy killed his wife and her lover. Hardy was sentenced to death. Hardy claimed error in the admission of an altercation with his wife 1-2 days before the murder. The court held evidence of a prior argument with or violence toward a victim is admissible to show motive or intent. Evidence that Hardy gave his gun to his son a couple days before the murder, telling him "he didn't need any drama," and then got the gun back was also properly admitted to prove intent. Finally, it was not clear that Rule 404(b) applied to Hardy's statements two days before the murder that his wife was gone and he "could kill them both", because it was not an "other act" and not offered to prove character. But if 404(b) applied to the statements, they were relevant to show intent, plan, or knowledge.

14. *State v. Hargrave*, 225 Ariz. 1 (2010): Hargrave was fired from a fast food restaurant. He returned with co-defendant Boggs, who had a handgun. Hargrave assisted in robbing the 3 employees, then Boggs forced them into the freezer and shot them while shouting racial epithets. Hargrave was sentenced to death for the murders. On appeal, he challenged the admission of three categories of "other act" evidence: (1) Hargrave's involvement with a white supremacist group, (2) his statements that "things would have been different" if he had been awake when police found him, and (3) guns and ammunition recovered from the campsite at which he was apprehended.

HELD: The white supremacy involvement was relevant to motive, even though the State offered evidence of other motives as well (e.g., robbery, retaliation). Hargrave's statement was not fundamental error (there was no objection at trial), because of the substantial evidence at trial. Finally, the guns and ammunition from the campsite were properly admitted to rebut Hargrave's claim he did not know Boggs would have a gun. Notably, even the judge's erroneous instruction that the jury could consider "other act" evidence as demonstrating a character trait predisposing Hargrave to commit the crimes (a Rule 404(c) instruction), did not

constitute fundamental error [!]

15. *State v. Hausner*, 230 Ariz. 60 (2012): From 2005 to 2006, Hausner randomly murdered 6 people in the Phoenix area, wounded 18 others, several dogs and a horse. The victims were shot from his car with a shotgun or .22. His friend and roommate, Dieteman, participated in many of the shootings. After being convicted of 80 counts and sentenced to death for 6 of the murders, Hausner challenged admission of 5 categories of "other act" evidence:

Bisexuality: After Hausner testified on direct that Dieteman was bisexual, but he was not, the State was permitted to ask Hausner about his bisexuality. The Supremes found this not to be an abuse of discretion but underscored that trial courts should be cautious in admitting evidence of a witness's sexual orientation in cases in which it is not directly relevant.

Acts of vandalism/arson/shoplifting: During direct, Hausner testified he would never harm a person or animal or "anything" and was not violent. Because Hausner opened the door, the trial court did not abuse its discretion in allowing testimony that Hausner slashed tires and burned a tree. BUT- shoplifting was not proper rebuttal to nonviolence and should not have been admitted; the error was harmless because the trial court gave a proper Rule 404(b) limiting instruction.

Stabbing incident (brother): Hausner testified his brother was arrested for stabbing a man, but he was not present at the stabbing. He thus opened the door to the State eliciting testimony from Dieteman that he and Hausner were present at the time of the stabbing.

In-court demeanor (obscene gestures): Hausner testified that he thought the murders were tragic and felt that way throughout trial. Thus, the prosecutor properly asked Hausner if he had raised his middle finger to 2 victims in court during the trial, and later introduced testimony of each victim confirming the gesture.

Violence against ex-wife: Hausner held his ex-wife at gunpoint several years prior to the murders, and another time he chased her down in his car, caught her, and ripped her clothes. The court noted Hausner opened the door to these incidents by testifying that he was non-violent. [Strangely, though, the Supreme Court did not point out the error in the trial court's finding that the prior assaults were admissible under Rule 404(b)... The proper basis is Rule 404(a)(1)!?]

16. *State v. Hughes*, 189 Ariz. 62 (1997): Hughes strangled 17 year-old female Frankie Spencer in 1986 and was sentenced to death.

The trial court erred in admitting a Molotov cocktail arson merely because it also

involved a female victim who had angered Hughes and a juvenile who may have been paid to commit the crime. While the relationship between Hughes and the juvenile may have been relevant and served a proper Rule 404(b) purpose, the firebombing was not.

Likewise, a witness should not have been permitted to testify that Hughes threatened him about talking to police, both because the threat could have related to other criminal activity unrelated to the murder and because the witness did not hesitate in talking to the police.

The trial court erred in admitting excessive detail about Hughes' drug dealing which, although relevant, should have been limited to proving motive.

Also, Hughes' statement "If I have something out for someone I kill them" was too vague to be connected in some way to the charged offense, and the trial court should not have admitted it.

Hughes also claimed error under Rule 404(b) for admission of testimony that he was manipulative and controlling toward women. The court noted this is not a Rule 404(b) issue; this is evidence of a character trait, and under Rule 404(a) it is prohibited because Hughes did not put his character in issue. Hughes' conviction was reversed.

17. *State v. Hummert*, 188 Ariz. 119 (1997): Hummert was convicted of rape and kidnapping in the 1989 assault of a 19 year-old Tempe woman. Hummert attempted to introduce evidence of another sex assault which he did not commit. The trial court precluded the evidence because there were substantial differences between the crimes and because it did not pass Rule 403 balancing. The Supreme Court assumed marginal relevance of the evidence and held the trial court still could properly act within its discretion under Rule 403 in precluding the evidence. Any error would be harmless given the overwhelming evidence of Hummert's guilt.
18. *State v. LaGrand*, 138 Ariz. 275 (App. 1983): Defendant robbed two Safeway stores in Tucson. At trial on charges relating to one robbery, evidence of the other robbery was admitted. The appellate court held the evidence was properly admitted as a "common scheme or plan" under Rule 404(b) because "there are similarities where one might expect differences." Both robberies were at large chain food stores, happened around 9 p.m., involved only one robber in the store wearing sunglasses at night, with a small caliber handgun he showed from his right pocket and put back in his pocket, etc. These acts evidenced an M.O. and plan, and showed LaGrand's identity.

19. *State v. Lamar*, 144 Ariz. 490 (App. 1984): Lamar was one of several members of the Christ Miracle Healing Center Church charged with offenses arising out of a riot at Buena High School in Sierra Vista. He was found guilty of disorderly conduct and assault on a peace officer and placed on probation. Hayes claimed the trial court wrongly admitted evidence of the prior suspension of his bus privileges, his subsequent argument and scuffle with police, and his resulting expulsion from school. The appellate court determined the prior acts were properly admitted to show "the complete story." The prior acts showed why the school officials acted the way they did (i.e., reporting the incident to police and asking that Hayes be arrested if he returned to campus).

20. *State v. Lee*, 189 Ariz. 590 (1997): Lee was convicted for two murders involving robbery (one also involving rape) and sentenced to death. He claimed the two murders were improperly joined for trial. The Supreme Court agreed they were improperly joined as a "common scheme or plan" but separately analyzed whether evidence of each murder would have been admissible at trial of the other. Helpfully, the Court explained each of the 4 steps required in the Rule 404(b) analysis: (1) Proper purpose, (2) Relevance, (3) Rule 403 Weighing, and (4) Limiting instruction.

HELD: In this case, the proper purpose was that Lee contested his intent, claiming each of the victims had charged or attacked him when he pointed a gun at them. Evidence of the other murder tended to prove Lee's intent. Of course, this makes the evidence relevant as well. [NOTE: when would a "proper purpose" not be relevant? The relevance factor seems to add nothing.]

Strangely, as to the Rule 403 weighing, the Supreme Court merely pointed out that Lee repeatedly confessed he had intentionally robbed and killed both victims, corroborated by physical evidence. [NOTE: this seems more like a harmless error analysis. The appropriate Rule 403 balancing would discuss the power of the evidence in relation to its prejudicial effect.]

There was no specific "other act" limiting instruction given, but Lee did not request such an instruction and thus did not preserve the error for appeal.

The trial court's error on the joinder issue was harmless because evidence of each murder "would have been mutually admissible."

21. *State v. Machado*, 226 Ariz. 281 (2011): In 2000, the 16 year-old victim drove to the driveway of her mother's house, was heard arguing with a male, and was killed by a gunshot wound.

Initially, the investigation focused on Jonathan, a classmate and boyfriend of the victim's best friend. He had threatened to kill the victim and his girlfriend 2 weeks

earlier. A month after the shooting, the family received an anonymous call relating details of the shooting not publicly known, confessing to accidentally killing the victim because he was mad at her. Family members described the voice as “a cold, cocky, well-spoken” young white male. Police obtained a sample of Jonathan’s voice but lost it before playing it for the family. Jonathan was never charged.

Years later, investigators focused on Machado, whose mother said he had confessed the murder and supplied corroborating details. After Machado’s photo appeared on TV, a neighbor said he saw Machado walking down the street immediately after the murder.

At trial, the court admitted Jonathan’s death threats, his inconsistent accounts of his whereabouts, and the restraining order a former girlfriend obtained against him. However, the trial court excluded testimony about Jonathan’s other acts, including: (1) kidnapping 2 girls at gunpoint, (2) a road rage incident in which he pointed a gun at others, (3) an assault conviction for pointing a gun at a former girlfriend, threatening to kill her, and telling her he had killed before, and (4) the anonymous phone call and subsequent police investigation. Machado was convicted of 2nd degree murder.

The court of appeals reversed, holding all 4 categories of evidence should have been admitted. The Supreme Court granted review because the admissibility of third-party culpability (3PC) evidence is a recurrent issue of statewide importance. The Supreme Court analyzed whether Rule 404(b) applies to 3PC evidence, concluding that Rule 404(b)’s “central purpose is to protect criminal defendants from unfair use of propensity evidence.” The Court adopted the reasoning from *Gibson* and *Prion*, and rejected the reasoning from *Fish*, holding that Rule 404(b) does not apply to 3PC evidence. The Court dropped a footnote indicating that a defendant may not simply “throw strands of speculation on the wall and see if any of them will stick” under the guise of 3PC. But this limitation is based on Rule 401 (relevance) and Rule 403 balancing.

22. *State v. May*, 137 Ariz. 183 (App. 1983): May was tried and convicted of attempted aggravated assault after he took a gun and hid in the shed of his estranged wife’s lover armed with a gun. At trial, May claimed he just brought the gun for protection against his wife’s lover. The trial court admitted subsequent threats (made about 5 months after the charged conduct) May made toward his wife (e.g., “I’m going to get you yet. You’re dead yet.”). The appellate court affirmed the trial court’s admission of the subsequent threats, holding they were relevant to May’s intent, a critical issue, because they showed his attitude to keep his wife in a state of fear of injury by him in order to break up her relationship with her lover.

23. *State v. Mills*, 196 Ariz. 269 (App. 1999): Mills was convicted of murdering his estranged wife. During divorce proceedings, he had another man (who owed him for a drug debt) kill his wife. At trial, the court permitted the State to introduce evidence that about 2 months before the murder, Mills cut the brake line on his wife's car. Specifically, Mills had admitted cutting the brake line to his girlfriend; a mechanic kept the severed brake line, and it was admitted at trial during his testimony.

HELD: Cutting the brake line 2 months earlier showed Mills intent and motive to eliminate his wife as a source of difficulty in his divorce proceeding and to rebut his defense that he loved her, would not want to harm her, and wanted to reconcile. *Hughes* is distinguishable because the victims of the other acts were different than the victims of the charged offense.

The evidence was not unfairly prejudicial, which is evidence which "has an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." This evidence was prejudicial, but not on an improper basis, but rather because it showed Mills' plan, motive, and intent. [NOTE- great case to use in defining improper purpose and supporting the *Schurz/Yauch* point about undue prejudice.]

24. *State v. Mott*, 187 Ariz. 536 (1997): Mott was convicted of 2 counts of child abuse and first degree murder. The trial court barred battered woman's syndrome to negate intent (intentional/known for child abuse/felony murder). The court of appeals reversed, holding such evidence should have been permitted. The Supreme Court affirmed the trial court, reversing the court of appeals, and vacating the court of appeals decision.

It then considered Mott's claim the trial court erred by admitting evidence of her relations with her daughter 1-1.5 years before the murder that Mott: (1) left the victim with her in-laws from 2 months until 2 years old; (2) struck the child; (3) said she hated the child and wished she were dead; and (4) was outgoing and expressive and could stand up for herself.

The Supreme Court held the prior acts demonstrated Mott's lack of concern or dislike for her child, which could reasonably be construed as motive. [NOTE- interesting that the Court did not separately treat category #4, which seems to be rebuttal to the precluded battered woman evidence, and otherwise character evidence?] Here again, relevance is already settled by the "proper purpose" inquiry. Although the trial court failed to address Rule 403 balancing, the Supreme Court noted Mott raised no facts suggesting unfair prejudice. The prosecutor tried to convince the court to give a limiting instruction, but the trial court found the instruction confusing and refused to give it. Defense counsel did not object. Thus,

Mott waived the claim relating to the limiting instruction.

25. *State v. Olea*, 182 Ariz. 485 (App. 1995): Olea was a constable for the East Phoenix Justice Court. He was having trouble with his county car and took it for repairs to the county facility. A jail prisoner with trustee status found a plastic packet with .45 grams of cocaine in the car and reported it. Olea came back for the car and a mechanic confronted him. He called MCA Rick Romley and demanded an immediate meeting. At the meeting, he threw the packet on Romley's desk and stated he was being set up. Romley asked two of his investigators to meet with Olea. They suggested a screening test and Olea agreed. He tested positive for cocaine, including in two follow-up tests of the same sample by different labs. Ultimately, the State proceeded on charges of cocaine use (not possession), and Olea was convicted.

Olea claimed error in the admission of the packet of drugs under Rule 404(b). The court distinguished *Torres* and held the cocaine located in the car tended to negate the theory that the drug test results were mistaken. The packet was evidence of Olea's knowing use of the drug.

The trial court also properly excluded evidence of negative results of hair and urine drug screening tests as irrelevant. Those tests were ineffective for identifying one-time or occasional use (hair) or use at the time in question (urine- 8 days after the offense). They had some relevance in terms of showing Olea was not a habitual user, but this relevance was slight. The trial court did not reject the evidence based on Rule 403 grounds, so the court of appeals could not simply defer to such a finding. However, any error was harmless in light of the two lab results both positive for cocaine.

26. *State v. Payne*, 233 Ariz. 484 (2013): Payne and his girlfriend, Reina, starved & abused Payne's children ages 3 and 4 until they died. Payne left the children with Reina while he worked and sold heroin. Eventually, the children were kept in a closet permanently, and Payne stopped feeding them. After one child died, he left her body in the closet with the other child, who died about a week later. He then put the bodies in a box in a storage unit rented in his name. Incredibly, he then stopped paying for the unit. Staff looked in the unit and then became concerned about the odor, eventually calling the police. Police located Payne and Reina at a motel. Payne refused to go to the station for questioning without his attorney. Police arrested him on an unrelated warrant. At the station, Payne confessed. Reina pled guilty to 2 counts of 2nd degree murder in exchange for agreeing to testify. Payne was found guilty at trial of two counts of first degree murder and was sentenced to death.

The trial court permitted the State to present evidence that Payne sold heroin. The

court found the nature of Payne's job required him to be away for long hours, motivating him to lock the children in the closet to appease Reina. In other words, the work/long hours were probative of motive. The court attempted to minimize prejudice by admonishing the State "to limit the number of times...the issue was brought up, and not use racy words."

HELD: The trial court did not abuse its discretion. The evidence was relevant to the State's theory that he locked the children in the closet so he could stay away from home for long periods. With respect to Rule 403 balancing, the jury heard evidence of Gonzales and Payne using heroin, which marginalized the prejudicial effect of evidence he was out selling it. In a footnote: "Prosecutors and courts should tread carefully in areas that may affect the fairness of a criminal trial....the issue is close."

27. *State v. Prion*, 203 Ariz. 157 (2002): Prion was convicted of murdering one woman (he cut her arms off after he killed her) and kidnapping and assaulting another (a street prostitute who would often let men pick her up, not go through with the transaction, and then take their money and run). His conviction was reversed and remanded for new trial based on the trial court having precluded significant third party culpability evidence about a man named Mazure [NOTE- worth reading opinion to see the scope and apparent strength of the precluded 3PC evidence.]

In reviewing whether the murder and the kidnapping/assault were properly consolidated, the Court reviewed whether identity and motive were a proper basis for consolidation. Identity is applicable only where "the pattern and characteristics of the crimes...are so unusual and distinctive as to be like a signature." Citing *Stuard* and *Jackson*. Here "[a]ny connection between the two crimes is attenuated at best. The most that can be said is that each occurred in Tucson at the end of 1992, each involved a female victim, and a knife or knives were utilized by the perpetrator(s) at some point during commission of the crimes." These few factors were insufficient to suggest a signature crime or support a Rule 404(b) identity exception.

As to motive, the State argued the crimes showed a motive to terrorize, rape, kill, and dismember women. However, this was tantamount to a Rule 404(c)/aberrant sexual propensity argument, which was not supported by any specific findings, as Rule 404(c) requires. The Court also stated that "[h]is general threats to do harm have little probative value when not specifically directed at a particular victim." [NOTE- although the Court stated this in the midst of its Rule 404(c) discussion, it cited Rule 404(b) cases for this proposition, namely *Hughes* and *Bible*. The trouble is, highly specific threats not directed at a particular victim still might be directly relevant to motive under Rule 404(b)- the Court ignores this fact.]

"It is reasonably clear that the state's evidence in support of the Armenta counts does no more than raise an inference that the 'defendant acted in conformity with a

negative view of women...[and] this type of evidence is prohibited by Rule 404(a).” Quoting *Hughes*. Thus, joinder was improper and the case remanded for a new trial.

28. *State v. Ramirez-Enriquez*, 153 Ariz. 431 (App. 1987): Defendant was convicted of sales of small quantities of marijuana to an undercover police officer posing as a high school student. The appellate court held that admission of several categories of other act evidence was erroneous and reversed: (1) Officer testimony that the investigation was undertaken because of “numerous comments from concerned citizens” suspecting drug activity at Defendant’s residence (improper hearsay and prohibited under Rule 404(a)); (2) testimony about other sales and MJ seized from his home a month after the charged sale (not evidence of a particular plan of which the charged crime is a part); (3) testimony that a month after the charged sale, several young people were seen coming to D’s residence and leaving a few minutes later (violates Rule 404 because it attempts to prove guilt in late October from guilt in late November).
29. *State v. Ramsey*, 211 Ariz. 529 (App. 2005): Ramsey had his daughter read aloud pornographic stories about incest and then molested her. His wife found the binder of stories on the roof [!?] and called the police. The stories were admitted at trial under both Rule 404(b) & (c). On appeal, the court agreed with the State’s position that the pornographic stories about incest were relevant to Ramsey’s motive and intent to have a sexual relationship with his daughter. Separately, the stories were properly admitted under Rule 404(c).
30. *State v. Rivers*, 190 Ariz. 56 (App. 1997): Rivers was serving the remainder of his prison term through a home-arrest program. He dropped dirty on a urinalysis, and his parole officer called him to let him know he was going back to prison, instructing him to turn himself in on December 23rd. Defendant called back on 12/23 and said he knew he was in trouble but wanted to stay out for the holidays. Defendant did not report until 12/28. He was charged and convicted of escape and given a mitigated sentence of 1.5 years. He claimed the trial court abused its discretion in permitting evidence he failed a UA and the test revealed cocaine and opiate use.

HELD: The test results were not offered to prove Rivers was a drug user but to establish a motive for his escape from custody. They were relevant under Rule 404(b). [NOTE- impliedly recognizing that proper purpose and relevance are the exact same inquiry.] No abuse of discretion in trial court’s determination that the probative value was not substantially outweighed by the danger of unfair prejudice.

31. *State v. Rose*, 121 Ariz. 131 (1978): Victim couple awakens to Rose standing in their bedroom, taking the shotgun from the rack. Husband feigns sleep, and Rose goes to the living room and force’s the wife’s sister to leave the home with him at gunpoint. Husband runs out of the house and Rose pushes the sister away and

flees. A responding officer stops Defendant as he is speeding from the scene, with the shotgun and personal property from the victims' residence on his floorboards. He was subsequently ID'd as the intruder. At trial, the State introduced evidence that about an hour before his arrest, after a nearby, minor traffic accident, Rose had falsely identified himself using a Colorado driver's license with a different name. It was the same officer who later arrested Rose following the burglary. By that time, the rear plate was masked and the front plate was in the trunk.

HELD: The giving of phony identification coupled with the later hiding of the license plates suggest a purposeful concealment of identity.

GREAT QUOTE: "Intent is frequently proved by evidence of other criminal acts of the same character, because the reoccurrence of an act controverts a claim that it was done by accident or mistake. Intent, however, is simply the state of mind that coexists with the doing of an act, and can also be proved by whatever evidence would otherwise be receivable to show design, knowledge, or emotion. The evidence in the instant case is not of a prior similar burglary or kidnapping but nonetheless is admissible to show the defendant's intent." [NOTE- quote can be used in nearly every Rule 404(b)/intent exception case.]

The court went on to also find the evidence shows preparation and completes the story, and further explained that preparation discredits a claim of accident or mistake and sheds light on intent.

32. *State v. Salamanca*, 233 Ariz. 292 (App. 2013): Salamanca drove double the speed limit, weaving in and out of traffic, ultimately losing control of his SUV, crossing 5 lanes of traffic, and colliding head-on with the victim, who he killed. His BAC was more than double the legal limit, and his cell phone found on the floorboard below the front passenger seat showed 2 angry texts sent to his girlfriend moments before the collision. The first text ("I hope u die fuckwn stupid puycj") was sent 2 minutes, 15 seconds before the 911 call, the second text ("Fuck u stupid bitch") was sent 59 seconds before the 911 call. The trial court admitted both texts as intrinsic, along with evidence Salamanca had been informed of the risks of speeding and driving while impaired (the trial court did not permit reference to Salamanca's attendance at defensive driving school).

HELD: The trial court did not abuse its discretion by concluding the 2nd text was close enough in time to the collision that it was intrinsic. The jury could have concluded the 2nd text caused the collision. The appellate court did not reach whether the 1st text was intrinsic (the State argued it directly proved his reckless mental state), because it found the 1st text was admissible under Rule 404(b), because it proved Salamanca's state of mind less than 3 minutes before the collision. Because the trial court admitted both texts as intrinsic, it did not give a

limiting instruction. However, because the 2nd text was intrinsic, Salamanca was not prejudiced by the lack of a limiting instruction as to the first text. The trial court did not err in refusing to redact the profanity from the texts, because the profanity tended to show Salamanca's anger, which a juror could have concluded caused him to drive recklessly. The trial court properly admitted evidence of Salamanca's knowledge of the risks of drinking and driving, which was relevant because it bore on the elements of 2nd degree murder.

33. *State v. Salman*, 182 Ariz. 359 (App. 1994): Salman's friend Cross got in a fight with the victim's teenage son. Salman and Cross went to the victim's home at night, and Salman fired multiple shots into the home while the victim (but not her son) was present. He was convicted of aggravated assault. At trial, the State was permitted to introduce testimony that one month before the charged crime, Salman drew and pointed his gun at a different person to help a friend. The appellate court held the prior incident tended to show Salman's intent and motive to carry and use his gun on behalf of his friend to scare a 3rd person.

34. *State v. Schurz*, 176 Ariz. 46 (1993): Schurz stole beer from a group who were drinking in a stairwell behind a Phoenix motel. The victim joined the group, and said he would have stopped the theft had he been there. Schurz returned, attacked the victim, and eventually threw gasoline on him and lit him on fire. The victim survived more than four hours, but was horribly burned and died. Meanwhile, Schurz later robbed another victim, during which he held a lighter to the victim's neck.

HELD: The robbery involved a threatened burning, and thereby tended to establish identity as well as a motive for the earlier actions. It also tended to rebut the defense theory that Schurz was too inebriated to know what he was doing.

In rejecting Schurz' Rule 403 challenge, the Supremes provided a very useful quote: "[N]ot all harmful evidence is unfairly prejudicial. After all, evidence which is relevant and material will generally be adverse to the opponent. The use of the word 'prejudicial' for this class of evidence, while common, is inexact. 'Prejudice,' as used in this way, is not the basis for exclusion under Rule 403. Here, the evidence of the subsequent robbery was not unfairly prejudicial. It was adversely probative in the sense that all good relevant evidence is. It tended to show Schurz was the person who attempted to rob and burned Bahe. Within minutes, he robbed and threatened to burn again. Adverse, yes; unfairly prejudicial, no."

35. *State v. Smith*, 146 Ariz. 491 (1985): In August 1983, Smith shot and killed the victim during a robbery of the Low Cost Market in Yuma. At trial, the State introduced evidence that Smith committed three different robberies of Circle K stores in the summer of 1983. The Supremes held the three robberies were admissible to prove Smith committed the charged robbery at the Low Cost Market, "a convenience

store similar to the Circle K markets.” Smith had claimed mistaken identification; therefore the evidence of “similar robberies was relevant to establishing his identity in the instant offense.”

36. *State v. Stein*, 153 Ariz. 235 (App. 1987): Stein got a package of heroin in the mail worth almost \$3 million. When police searched his home, they also found methamphetamine and marijuana, which were the subject of a separate indictment from the heroin. On appeal, Stein claimed the trial court erred in granting the State’s motion to consolidate the two causes of action. On appeal, the court held consolidation was appropriate because at either trial, evidence of the other drugs would have been admissible under Rule 404(b). Because Stein claimed that the heroin was sent to him by mistake and that he had no knowledge of the methamphetamine found in his home, at the trial involving either drug, evidence of the other could have properly been admitted to demonstrate his knowledge, intent, and absence of mistake.
37. *State v. Taylor*, 169 Ariz. 121 (1991): The victim kept threatening Taylor with violence (Taylor lived with, and was romantically involved with, the victim’s sister). Taylor eventually shot him repeatedly outside his apartment and was convicted of second degree murder. The Supreme Court decided the trial court erred in refusing to give a justification instruction and reversed on that ground. Because the issue was likely to arise again on remand, the Supremes also addressed whether the victim’s prior conviction for child abuse should be admissible to prove, *inter alia*, the victim’s propensity for violence and his own state of mind.

HELD: Taylor knew of the abuse prior, it involved immersing a child in scalding water and therefore was unquestionably violent, and therefore it was relevant to Taylor’s state of mind when he shot the victim. It was relevant both to Taylor’s apprehension for his own safety, as well as for the safety of the two children in the apartment at the time of the shooting.

The trial court had failed to expressly conduct Rule 403 balancing, thus the Supreme Court remanded with instruction to make explicit Rule 403 findings (which, it noted, would not be reversed absent an abuse of discretion).

38. *State v. Terrazas*, 189 Ariz. 580 (1997): Detectives found the frame of a stolen truck on Terrazas’ property. Terrazas claimed he had been away for four days and someone left the vehicle parts on his property. He waived a jury trial. The State introduced evidence of three prior criminal acts (all involving stolen trucks) for which Terrazas had never been charged. At the bench trial, the court precluded evidence of one of the stolen trucks, but relied on evidence from the other two incidents. The court of appeals affirmed, and the Supreme Court granted review to consider the level of proof to be applied in admitting evidence of prior acts bad in a criminal case.

HELD: The Supreme Court rejected the preponderance of the evidence which the court of appeals had adopted from *Huddleston v. United States*. “[B]efore admitting evidence of prior bad acts, trial judges must find that there is clear and convincing proof both as to the commission of the other bad act and that the defendant committed the act.”

39. *State v. Van Adams*, 194 Ariz. 408 (1999): In 1996, Van Adams murdered a 22 year-old female real estate agent in a model home in Phoenix. At trial, the State admitted evidence of Van Adams’ California conviction for a 1990 rape of a young real estate agent in a model home, as well as his unusual interactions with female agents at model homes in the development where the murder occurred (one earlier that day and one several months before).

HELD: Evidence of the California rape and the interaction with the agent on the afternoon of the murder tended to prove Van Adams’ identity and to establish his opportunity and intent. If similarities between the acts form the basis for relevance, then there must be “similarities where one would expect differences.” Here, the similarities were numerous. In its Rule 403 analysis, the Court referred to “[t]he probative value of this testimony in relation to establishing [Van Adams’] identity, or ‘fingerprint.’”

Notably, the Court held the remoteness of the 1990 California rape (Van Adams’ spent only 1-2 years in prison for it), “generally does not determine its admissibility,” and the trial judge did not err in permitting the jury to consider it.

Finally, the Court upheld the limiting instruction (which Van Adams asked for and received), despite the fact that it did not distinguish between the different purposes for which the different acts were admitted.

40. *State v. VanWinkle*, 230 Ariz. 387 (2012): VanWinkle beat a fellow Maricopa County Jail inmate to death and was sentenced to death. He claimed the trial court erred in admitting evidence of his other assaultive conduct toward guards and inmates. The trial court admitted the evidence because VanWinkle had raised a defense that he was acting in self-defense per “inmate rules.”

HELD: “Evidence that VanWinkle has, on several occasions, attacked others at the jail facility without justification supported the State’s argument that VanWinkle did not act in self defense when he killed [the victim].”

41. *State v. Vigil*, 195 Ariz. 189 (App. 1999): Vigil threw a rock or log through a window at his ex-girlfriend’s house. Then, he shot at the house (the charged conduct). Later, he threw a beer can at the house. The trial court permitted testimony of these 2

other incidents “to show ‘motive’ and ‘identity,’ which were not the primary reasons urged by the prosecution” and because they were “reported to the police.”

HELD: The trial court did not apply any standard (other than that the acts were “reported to the police”), let alone the clear and convincing standard from *Terrazas*. Further, the trial court failed to admit the evidence for the purpose of showing the continuing pattern of harassment (as argued by the State), instead admitting the evidence to prove “identity” and “motive,” “neither of which was at issue.” The appellate court rejected the argument that the acts should be admitted to prove the “pattern” of harassment, because this does not satisfy the narrow definition of “common scheme or plan” from *Ramirez Enriquez* and *Ives* (“a particular plan of which the charged crime is a part”). Finally, the trial court also erred in failing to conduct any Rule 403 analysis. These errors were not harmless; the court could not say BRD the jury would have convicted Vigil if the challenged evidence had been excluded. Reversed and remanded.

42. *State v. Villalobos*, 225 Ariz. 74 (2010): Villalobos repeatedly punched his girlfriend’s five year-old daughter, killing her. He was tried for child abuse and murder and sentenced to death. At trial, the State admitted evidence that Villalobos had abused the victim (by shaking her and “bruising” her) in the three months leading to her death.

HELD: Evidence of the prior abuse was relevant to establish Villalobos’ mental state and to rebut his claim that he did not mean to hurt the victim, hit her as a reflex, and her mother could have caused the fatal injuries. The trial court did not abuse its discretion in its Rule 403 analysis, because the prior abuse occurred in the three months preceding the fatal attack (“shortly before”), and a limiting instruction was given.

43. *State v. Williams*, 183 Ariz. 368 (1995): Williams beat and shot his ex-girlfriend, Rita, to death (he also ran her over with a car). Five weeks after the murder, he confronted an acquaintance, Norma, who was working as a clerk at a Circle K, accused her of spreading the rumor that he killed Rita, robbed her and shot her. The two separate cases were consolidated for trial. Appealing his death sentence, Williams challenged consolidation and admission of certain other acts.

CONSOLIDATION: Evidence of the robbery and attempted murder was relevant to show his consciousness of guilt and thus his identity as Rita’s killer. “Evidence that a criminal defendant sought to suppress evidence adversely affecting him is relevant to show a consciousness of guilt.” The fact there were other possible reasons why Williams shot Norma goes to the weight, not the admissibility, of the evidence.

Also, evidence of the armed robbery was admissible to support the credibility of one